Supreme Court No. 932824

COA No. 337821-III

SUPREME COURT OF THE STATE OF WASHINGTON

DONALD R. SWANK, individually and as personal representative of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK, individually,

Plaintiffs-Petitioners,

vs.

VALLEY CHRISTIAN SCHOOL, a Washington State non-profit corporation, JIM PURYEAR, individually, and TIMOTHY F. BURNS, M.D., individually,

Defendants-Respondents.

PETITIONERS' ANSWER TO AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Plaintiffs-Petitioners Donald R. Swank, individually and as personal representative of the Estate of Andrew F. ("Drew") Swank, and Patricia A. Swank, individually (collectively "Swank"), submit the following answer to the amicus curiae briefs filed on behalf of the Washington State Association for Justice Foundation ("WSAJF"), Washington Defense Trial Lawyers ("WDTL"), and several physician organizations ("Physicians").[1]

I. WSAJF is correct that an implied cause of action should be assumed when the Legislature confers a statutory right on an identifiable class and does not provide an express remedy for violation of the right.

WSAJF highlights key passages from this Court's decision in *Bennett v. Hardy,* 113 Wn. 2d 912, 919-20 & 921, 784 P.2d 1258 (1990), stating the test for recognition of implied statutory causes of action. *See* WSAJF Br. at 6, 8 & 9 (citing, quoting & discussing *Bennett*). In *Bennett*, the Court quoted Justice Brachtenbach's dissent in *McNeal v. Allen*, 95 Wn. 2d 265, 277, 621 P.2d 1285 (1980), for the proposition that:

> we can ***assume*** that the legislature is aware of the doctrine of implied statutory causes of action and also ***assume*** that the legislature would not enact a remedial statute granting

[1] The physician organizations are the American Medical Association, Washington State Medical Association, Oregon Medical Association, Idaho Medical Association, and Idaho Academy of Family Physicians. The first four organizations are representatives of the Litigation Center of the AMA and State Medical Society. *See* Physicians Br. at 1 n.1.

> rights to an identifiable class without enabling members of that class to enforce those rights.

Bennett, 113 Wn. 2d at 919-20 (emphasis added). The Court further stated that "***we may rely on the assumption*** that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights" in recognizing an implied statutory cause of action. *Id.* at 921 (emphasis added).

Other decisions are in accord with the *Beggs* assumption, and there appear to be no contrary authorities. *See* WSAJF Br. at 8-9 (citing *Tyner v. State Dep't of Social & Health Servs.,* 141 Wn. 2d 68, 80, 1 P.3d 1148 (2000), as following the *Bennett* assumption in recognizing a parent's implied cause of action for negligent investigation of child abuse in violation of RCW 26.44.050); *see also Beggs v. Dep't of Social & Health Servs.,* 171 Wn. 2d 69, 78, 247 P.3d 421 (2011) (quoting key language from *Bennett*, and recognizing children's implied cause of action for failure to report child abuse in violation of RCW 26.44.030); *Evans v. Tacoma Sch. Dist.,* 195 Wn. App. 25, 43, 380 P.3d 553 (citing *Beggs* for the *Bennett* assumption, and recognizing parents' implied cause of action for failure to report child abuse in violation of RCW 26.44.030), *rev. denied,* — Wn. 2d —, 385 P.3d 124 (2016); *Wingert*

v. Yellow Freight Sys., Inc., 104 Wn. App. 583, 591-92, 13 P.3d 677 (2000) (quoting *Bennett*, and recognizing employees' implied cause of action for violation of labor regulations under Ch. 49.12 RCW), *aff'd,* 146 Wn. 2d 841, 849-50, 50 P.3d 256 (2002).

The cases declining to recognize an implied statutory cause of action still acknowledge the *Bennett* assumption, and either find it inapplicable because the statute in question does not identify the protected class, or rely on contrary indicia of legislative intent to overcome the assumption. *See, e.g., Ducote v. State Dep't of Social & Health Servs.,* 167 Wn. 2d 697, 706, 222 P.3d 785 (2009) (quoting *Bennett* assumption language, but holding stepparents did not have implied cause of action for negligent investigation of child abuse in violation of RCW 26.44.050 because they are not included in the statutorily protected class); *Adams v. King County,* 164 Wn. 2d 640, 653-56, 192 P.3d 891 (2008) (noting *Bennett* assumption, but holding Washington Anatomical Gift Act does not protect a clearly identifiable class and finding legislative intent to rely on common law remedies rather than an implied statutory remedy).

However, in this case it is conceded that the Lystedt law clearly identifies the protected class of youth athletes such as Drew

Swank,[2] and there is no indication of legislative intent that militates against recognition of an implied statutory remedy. The Court of Appeals below acknowledged the *Bennett* assumption but failed to apply it properly in determining whether the Lystedt law gives rise to an implied cause of action. *See Swank*, 194 Wn. App. at 80-81.

II. WSAJF is correct that a statute must be read as a whole to determine whether it gives rise to an implied cause of action, and that the Court of Appeals failed to read the Lystedt law as a whole.

WSAJF contends that a statute must be read as a whole to determine whether it gives rise to an implied cause of action. *See* WSAJF Br. at 10-11 & 15-16 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn. 2d 1, 11-12, 43 P.2d 4 (2002)). This follows from the element of the *Bennett* test requiring consideration of "legislative intent." *See* 113 Wn. 2d at 920-21. Discerning legislative intent in the context of an implied statutory cause of action is no different from statutory interpretation in other contexts. *See Carr v. State ex rel. Washington St. Liquor Control Bd.*, 188 Wn. App. 212, 223-24, 352 P.3d 849 (stating "[w]hen determining whether legislative intent supports creating a private cause of action we employ principles of statutory construction and interpretation," and

[2] The Court of Appeals below stated, "[w]ithout question, Drew [Swank] was within the class who was intended to be benefitted and protected by the Zackery Lystedt law." *See Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 81, 374 P.3d 245 (brackets added), *rev. granted,* 186 Wn. 2d 1009 (2016).

declining to recognize cause of action for damages suffered as a result of privatization of liquor sales under RCW 66.24.620(6)(b) based on "the provision as a whole ... within the context of the entire legislation"; brackets & ellipses added), *rev. denied,* 184 Wn. 2d 1022 (2015). Legislative intent is normally determined from reading an enactment as a whole. *See, e.g., Whatcom County v. Hirst,* 186 Wn. 2d 648, 667, 381 P.3d 1 (2016) (citing *Campbell & Gwinn, supra*, for the proposition that "[t]he court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole"; brackets added).

WSAJF correctly points out that the Court of Appeals below failed to read the Lystedt law as a whole. *See* WSAJF Br. at 11. In particular, Swank identified four aspects of the law that support an implied remedy: (1) the clear identification of the protected class of youth athletes; (2) the mandatory phrasing of the obligations imposed by the law; (3) the absence of an alternative enforcement mechanism; and (4) the limited grant of immunity for volunteer health care providers. *See* Swank Br. at 30-32; Swank Pet. for Rev.

at 7-9; Swank Supp. Br. at 7-8. However, the Court of Appeals failed to acknowledge three of the four. *See Swank*, 194 Wn. App. at 81. The features of the Lystedt law ignored by the appellate court should be sufficient to support recognition of an implied cause of action.

III. WSAJF is correct that a grant of immunity normally supports an inference that the legislature intended to create an implied cause of action, and that the limited grant of immunity to volunteer health care providers in the Lystedt law supports such an inference here.

WSAJF notes that the Court of Appeals appeared to be unable to reconcile this Court's decision in *Beggs,* 171 Wn. 2d at 78, stating that a grant of immunity from liability in the statute requiring certain individuals to report child abuse "clearly implies that civil liability can exist in the first place," with its decision in *Adams,* 164 Wn. 2d at 656, stating "if the legislature had intended to provide a remedy under the WAGA [Washington Anatomical Gift Act], it would have expressly created the liability to which the immunity corresponds." *See* WSAJF Br. at 12-15; *see also Swank*, 194 Wn. App. at 81-82 (characterizing this Court's precedent as "divided," and finding the legislature's intent is "murky" in light of this precedent).

However, as WSAJF points out, *Adams* simply stands for the proposition that a grant of immunity is not conclusive on the issue of legislative intent to create an implied statutory cause of action where the statute in question does not clearly identify a protected class and legislative intent otherwise militates against recognition of an implied cause of action. *See* WSAJF Br. at 14-15. In *Adams,* the Court found that the WAGA did not protect an identifiable class. *See* 164 Wn. 2d at 655 (stating "the WAGA creates procedures for the procurement of organs, not for the protection of persons who donate organs"). The Court also found that the legislature intended to rely on common law remedies rather than an implied statutory remedy. *See id.* at 656 (citing official comment to the uniform act on which WAGA was based). For these reasons, *Adams* represents an exception to the intuitive rule that a statutory grant of immunity supports an inference that the legislature intended to create an implied statutory cause of action.[3]

[3] WSAJF states "[t]o the extent Adams can be read for the proposition that grants of immunity evidence legislative intent to deny a remedy, it would appear to be anomalous" in light of *Beggs* and the Court's subsequent decision in *Kim v. Lakeside Adult Family Home,* 185 Wn. 2d 532, 542-43, 374 P.3d 121 (2016), which held that a grant of immunity under the Abuse of Vulnerable Adults Act, RCW 74.34.050, supports an implied cause of action under that statute. *See* WSAJF Br. at 15 n.7 (brackets added). If *Adams* were deemed to be in conflict, *Beggs* and *Kim* should be controlling because they are the Court's more recent pronouncements on the subject. *See Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn. 2d 643, 659, 272 P.3d 802 (2012) (stating when there is conflicting case law, the Court's more recent pronouncement should control).

The limited grant of immunity for volunteer health care providers in the Lystedt law bolsters the other indicia of legislative intent to create an implied cause of action under the statute. In contrast the statute at issue in *Adams,* the Lystedt law protects a clearly identifiable class of youth athletes, and there is no indication the legislature intended to rely on other remedies to enforce the statute. The nature of the grant of immunity in the Lystedt law, which is limited to volunteer health care providers, further distinguishes this case from *Adams* and supports an inference that the legislature intended non-volunteer health care providers and non-health care providers to be subject to civil liability under the statute.

IV. WSAJF is correct that the Court of Appeals substituted a more stringent "best achieved" standard for this Court's "consistent with" legislative intent standard for an implied statutory cause of action in *Bennett*, and improperly considered non-identical "alternate remedies" unrelated to the purposes of the Lystedt law.

WSAJF points out that the Court of Appeals appeared to alter the *Bennett* test, stating that it "asks whether the legislative purpose is ***best achieved*** by implying a cause of action" and that this inquiry involves consideration of the availability of alternate remedies. *See* WSAJF Br. at 16-17 (quoting *Swank*, 194 Wn. App. at

82). On this basis, the Court of Appeals determined that "we need not imply a new cause of action" because "[t]he Swanks have common law negligence remedies against [Valley Christian School] and [Jim] Puryear," and "[t]hey also have a medical malpractice remedy against Dr. Burns." *Swank* at 82 (brackets added).

The appellate court's "best achieved" formulation and its consideration of alternate remedies is not supported by citation to authority, and is contrary to the terms of the *Bennett* test for recognizing an implied statutory cause of action, which is phrased in terms of whether an implied remedy is "consistent with" the purpose of the statute. *See* WSAJF Br. at 17 (citing *Bennett,* 113 Wn. 2d at 920-21). The "best achieved" formulation also appears to be at odds with the assumption underlying *Bennett* that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights. *See Bennett* at 921.

As WSAJF notes, consideration of alternate remedies "should be deemed relevant only to the extent it may illuminate the Legislature's intent and purposes in enacting the statute." WSAJF Br. at 17. Here, the text of the Lystedt law itself recognizes that

existing remedies have proven insufficient to serve the purposes of the law:

> The legislature recognizes that, despite having generally recognized return to play standards for concussion and head injury, some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington.

RCW 28A.600.190(1)(c). If existing remedies had been sufficient to enforce generally recognized return to play standards for concussion and head injury, there would have been no reason to adopt the Lystedt law. In the absence of an implied statutory cause of action, a jury could find that a coach, school or non-volunteer health care provider who violated the mandatory provisions of the Lystedt law was not negligent or complied with the applicable standard of care. *See* RCW 5.40.050 (providing that breach of statute gives rise to permissive, not mandatory, inference of negligence); RCW 7.70.030-.050 (stating requirements to prove medical negligence). An implied statutory cause of action is therefore consistent with the purpose of the Lystedt law to protect youth athletes from concussion and head injury.

V. Physicians and WDTL do not address the Swank's arguments that the Lystedt law gives rise to an implied statutory cause of action.

Physicians assume for the sake of argument that an implied cause of action for violation of the Lystedt law exists, but otherwise rely on Dr. Burns' briefing on the issue. *See* Physicians Br. at 17 & n.5. WDTL similarly relies on Dr. Burns' briefing. *See* WDTL Br. at 16. Neither Physicians nor WDTL provides any independent analysis of whether the Lystedt law gives rise to an implied statutory cause of action.[4]

VI. Physicians' and WDTL's jurisdictional arguments are premised on a characterization of the facts as being limited to medical care provided within the State of Idaho, and they do not acknowledge the dispositive fact that Dr. Burns cleared Drew Swank to play football in Washington pursuant to the requirements of the Lystedt law.

The jurisdictional dispute in this case hinges upon the underlying facts rather than the applicable law. Physicians characterize the underlying facts as involving medical care provided

[4] WDTL seems to suggest that Dr. Burns has no obligation to comply with the Lystedt law except by "tacit agreement," WDTL Br. at 16, and Physicians argues that jurisdiction should not depend on the nature of the claim asserted, Physicians Br. at 17. However, the Lystedt law does not contain an exception for out-of-state health care providers who provide written clearance for youth athletes to participate in Washington interscholastic sports. *See* RCW 28A.600.190. A statute should be given its intended range of application, including non-state residents, where it is otherwise applicable. *Cf. Thornell v. Seattle Serv. Bur., Inc.,* 184 Wn. 2d 793, 363 P.3d 587 (2015) (holding the Washington Consumer Protection Act, Ch. 19.86 RCW, applies to out-of-state plaintiffs as well as out-of-state defendants).

by Dr. Burns to Drew Swank solely within the state of Idaho. *See* Physicians Br. at 2. They describe Dr. Burns' written clearance for Drew to return to play football in Washington pursuant to the requirements of the Lystedt law as a mere "follow-up note" that was picked up at Dr. Burns' office by Drew's mother. *See id*. at 2, 5 & 8. They portray Dr. Burns' role solely in terms of knowing that Drew would return to play football in Washington, rather than authorizing his return under the Lystedt law. *See id*. at 2, 5 & 14.

For its part, WDTL states that it "generally relies upon the facts set forth in Respondent Dr. Burns' briefing." WDTL Br. at 1. WDTL does not address the problems with Dr. Burns' portrayal of the facts. *See* Swank Reply to Burns at 1-4. In particular, Dr. Burns claimed the fact that he cleared Drew Swank to play football in Washington pursuant to the requirements of the Lystedt law "is not supported by the actual facts in the record." Burns Br. at 18 (no citation to record). However, Dr. Burns and WDTL do not acknowledge that, when Drew's mother called to inquire about a release for Drew to return to play, she specifically informed Dr. Burns' nurse that "Drew plays [for a] school in the State of Washington and they have a new law and before he can go back to play, he has to have a release from the doctor." CP 188 (brackets

added); *accord* CP 878 & 879. Later that same day, Dr. Burns' nurse called back to inform Drew's mother that he wrote a note clearing Drew to return to play. *See* CP 188.

As with Physicians, WDTL characterizes the underlying facts as involving medical care provided by Dr. Burns to Drew Swank solely within the state of Idaho, and portrays Dr. Burns' role in clearing Drew to return to play football in Washington as merely knowing that he would return to play football in the state. *See* WDTL Br. at 8, 10-11, 14, 15-16 & 18.

On the basis of these characterizations, Physicians and WDTL attempt to limit the relevant jurisdictional facts to the "unilateral" actions of Drew Swank in traveling to Washington to play football, Dr. Burns' knowledge that he would be playing football in the state, and the manifestation of his injury in this state. *See* Physicians Br. at 1-3, 5, 13 & 15-18; WDTL Br. at 8, 10-11, 14, 15-16 & 18.

Physicians' and WDTL's characterizations of the jurisdictional facts do not account for all of the relevant facts or the standard of review on summary judgment. Drew Swank could not return to play football in Washington unless and until he received

written clearance from a health care provider. The Lystedt law provides in pertinent part:

> A youth athlete who has been removed from play may not return to play until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider.

RCW 28A.600.190(4). Dr. Burns undertook to provide written clearance for Drew to return to play football in Washington, as required by the Lystedt law. He was specifically informed of the existence of the law and the written clearance requirement by Drew's mother (through his nurse). In this way, Dr. Burns facilitated Drew's return to play football in Washington, and is not a fair characterization of the record to contend that jurisdiction is premised upon nothing more than the actions of Drew Swank, the knowledge of Dr. Burns, or the manifestation of injury in Washington.

Dr. Burns should be subject to personal jurisdiction in Washington based upon his own intentional actions in undertaking to provide written clearance for Drew to return to play football in the state. This satisfies purposeful availment and minimum contacts requirements of due process and Washington's long-arm statute because the Swanks' claim arises from these actions of Dr.

Burns, which were directed toward the state. None of the cases cited by Physicians and WDTL declining to exercise personal jurisdiction over traditional medical negligence claims against an out-of-state physician are comparable.

VII. Contrary to Physicians and WDTL, *Lewis v. Bours* is distinguishable and should not be controlling here because it is expressly limited to cases where the sole jurisdictional fact is manifestation of injury in Washington.

WDTL contends that this Court's decision in *Lewis v. Bours,* 119 Wn. 2d 667, 835 P.2d 221 (1992), is controlling. *See* WDTL Br. at 2, 3 & 15-16. Physicians likewise contends that *Lewis* is controlling, and further states that this Court would have to overrule the decision in order to exercise personal jurisdiction over Dr. Burns. *See* Physicians Br. *passim*. However, *Lewis* is distinguishable.

In *Lewis,* a traditional medical negligence claim, the Court held that the location of a tort for jurisdictional purposes was the place where medical treatment was rendered. *See* 119 Wn. 2d at 673-74. The case represents "an exception to the general rule that the place of the tort is the place where the injury occurs." *Id.* at 673. The Court specifically limited *Lewis* to its facts:

> We ... hereby create an exception to the general rule that the place of the tort is the place where the injury occurs. In the

> event that a nonresident professional commits malpractice in another state against a Washington State resident, that, ***standing alone***, does not constitute a tortious act committed in this state regardless of whether the Washington State resident suffered injury upon his or her return to Washington.

Id. at 673 (ellipses & emphasis added). The holding is thus confined to malpractice claims arising from out-of-state treatment, under circumstances where the sole fact supporting the exercise of jurisdiction is the manifestation of injury within the state of Washington.[5] Outside of this context, *Lewis* does not purport to alter the general rule for exercising personal jurisdiction under the long-arm statute. *Lewis* is distinguishable and not controlling here because the Swanks have alleged an implied statutory cause of action against Burns for violation of the Lystedt law in clearing Drew Swank to return to play football in Washington, apart from a traditional medical negligence claim.

In order to come within the rule of *Lewis,* Physicians and WDTL fall back on their characterization of the Swanks' claim as involving medical care provided by Dr. Burns to Drew Swank solely within the state of Idaho. Because this characterization is inaccurate and unfair, as noted above, *Lewis* is not controlling.

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[5] Although plaintiffs in *Lewis* were residents of Washington, the focus of the *Lewis* decision is on the place of injury rather than on the residency of the plaintiffs.

VIII. The concerns expressed by Physicians and WDTL about multi-jurisdictional liability are overblown and outweighed by the purposes of the Lystedt law as applied in the narrow circumstances when an out-of-state physician provides the written clearance required by the statute for a youth athlete to return to interscholastic competition in Washington.

WDTL expresses concern about a physician being "required to assume that he was subjecting himself to the laws—and subsequently to the expectation of being haled into court—anywhere that his patients might subsequently travel." WDTL Br. at 17. Physicians further contend that physicians would decline to serve patients who may travel out of state, based on similar concerns. *See* Physicians Br. at 14-16. This concern is overblown because personal jurisdiction in this case is not premised on where the patient might travel, but rather on the physician's intentional act of clearing a youth athlete to return to competition in interscholastic sports in Washington as required by the Lystedt law. The physician has complete control over his own actions. If he does undertake to medically supervise and facilitate a youth athlete's participation in interscholastic sports in Washington, then it is entirely reasonable to expect that he will comply with the legal requirements that govern those actions. The purpose of the Lystedt

law to protect youth athletes from sports-related concussion and head injury would be compromised if the Court declines to exercise jurisdiction under these circumstances.

Respectfully submitted this 5th day of January, 2017.

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The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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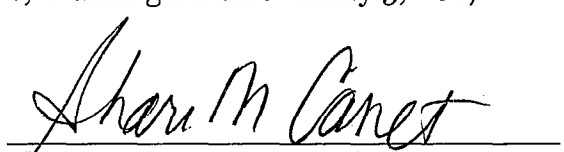

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